

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36004

CANADIAN PACIFIC RAILWAY LIMITED

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Public Record

**Comments of the
Joint Shipper Associations**

Pursuant to the Surface Transportation Board (“STB” or “Board”) order served in the above-captioned docket on March 10, 2016, the American Chemistry Council, The Fertilizer Institute, the Chlorine Institute, Inc., and the National Industrial Transportation League (collectively the “Joint Shipper Associations”) hereby comment upon the “Petition for Expedited Declaratory Order” filed by Canadian Pacific Railway Limited (“CPRL”) on March 2, 2016 (“Petition”). The Joint Shipper Associations urge the Board, in the first instance, to decline to issue a declaratory order due to the incomplete and hypothetical nature of CPRL’s Petition. If the Board elects to address the merits of CPRL’s Petition, it should deny the Petition based upon the limited facts presented and the strong indicia of *de facto* control that is inherent in a voting trust structure that places the purchaser in trust and transfers management from the purchaser to the target carrier. These comments are directed solely at the voting trust structure proposed by CPRL and should not be construed as supporting or opposing an associated merger application that may or may not follow at a later date.

I. BACKGROUND.

CPRL has publically made three offers to acquire Norfolk Southern Railway Company (“NS”) and to merge NS with CPRL’s other railroad subsidiaries, collectively referred to as the

Canadian Pacific Railroad (“CP”). Pet. at 3-5. NS management has rejected each offer. *Id.* CPRL now has decided to make its case directly to NS shareholders. *Id.* at 5. CPRL’s case, however, is not limited to just the benefits of the proposed merger, but also includes purported benefits from a unique and unprecedented voting trust structure.¹ In other words, shareholder approval of this merger is as much, if not more, about the voting trust than the actual merger.² The contemplated voting trust would enable CPRL to assume control of NS even prior to STB review of the transaction to begin making immediate changes in how NS operates.³ Because NS has raised legitimate questions regarding the permissibility of this voting trust structure, CPRL has filed the Petition to remove uncertainty with the hope that a favorable STB decision would persuade NS (and CP) shareholders to support CPRL’s acquisition of NS if for no other reason than the purported benefits of the voting trust structure.

Voting trusts are common instruments for completing the acquisition of a rail carrier before receiving regulatory approval for the transaction without violating the statutory prohibition against common control of two or more rail carriers unless the STB has approved. Typically the purchaser (in this case CPRL) would continue in control of its existing railroad subsidiary(ies) (in this case CP) and place the target carrier (in this case NS) into the voting trust.

¹ Pet. at 8 (describing the proposed voting trust structure as “atypical”).

² Pet. at 9 (noting that uncertainty about the voting trust structure could influence stockholder perception of the value of a merger); *id.* at 10 (“Stockholders from both companies have informed CPRL that they are supportive of CPRL’s efforts, but some have expressed reservations based on NS’s claims that the proposed voting trust structure could not be approved.”).

³ Pet. at 8 (the voting trust structure “would allow Mr. Harrison to apply the precision railroading model at NS...regardless of the regulatory outcome”); 15 (“Mr. Harrison can start the process of developing similar corporate cultures and operational practices during the approval process”).

The purchaser would not have any control over the management or operations of the target company, which typically would continue to function as it did prior to the transaction.

There are two atypical elements of CPRL's proposed voting trust, however, that are the subject of CPRL's Petition. First, CPRL would place CP into the voting trust instead of NS, thereby enabling CPRL to exercise immediate control over NS ostensibly while no longer exercising its control over CP pending the STB's merger review. Second, CP's CEO, E. Hunter Harrison, would resign his position with CP and CPRL would appoint him to a comparable position with NS, thereby exerting CPRL's control over NS. Several other CP managers and directors also might transfer to NS. CPRL asks the STB to address each of these issues by answering the following questions:

1. Would a *potentially permissible* way to avoid unlawful control be for CPRL to hold the voting securities it owns in its carrier subsidiaries in a voting trust while CPRL acquires ownership and control of NS and seeks STB approval of a CP-NS merger? Pet. at 12.
2. Whether it is *potentially permissible* for the current CP CEO, E. Hunter Harrison to resign his position with CP and assume the comparable position at NS? *Id.* at 17.

CPRL urges the Board to answer both questions affirmatively.

II. THE STB SHOULD NOT ISSUE AN ADVISORY OPINION ON AN INCOMPLETE AND HYPOTHETICAL VOTING TRUST PROPOSAL.

CPRL's Petition is most notable for what it does not ask the Board to address. CPRL does not present an actual voting trust agreement for the Board to review, but instead presents abstract questions as to whether two elements of a voting trust would be "potentially permissible" without violating the prohibition against unlawful control. Pet. at 12. The Board has procedures for issuing informal staff opinions as to whether a proposed voting trust effectively insulates the settlor from unauthorized acquisition of control. 49 C.F.R. § 1013.3(a).

It is notable that these rules for informal staff opinions require submitting a copy of the actual voting trust, whereas CPRL has requested a formal declaratory order from the Board based upon far less information. This alone should cause the Board to decline CPRL's Petition.

Furthermore, according to STB regulations, voting trust applicants "must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust...would be consistent with the public interest." 49 C.F.R. § 1180.4(b)(4)(iv). CPRL purports only to address the unlawful control factor and expressly renounces any request for a determination of the public interest. Pet. at 12. But CPRL inappropriately ignores the public interest factor and does not fully address the unlawful control factor.

As CPRL itself all but concedes, its Petition seeks an advisory opinion on an abstract proposal based on just one of two applicable factors.⁴ That is very different from this agency's historical use of declaratory orders, which have held that this type of broad, abstract declaration is inappropriate when a determination can only be made by considering the totality of the circumstances. See, *Tyco Int'l (US) Inc.—Pet. for Declaratory Order—Contracting for Motor Carrier Services*, STB Docket No. MC-C-35002, slip op. at 2-3 (served April 20, 2001). Thus, regardless of whether the Board has discretion to issue an advisory opinion, it should not do so on the limited facts supplied or assumed by CPRL in this instance.

A. The Board Cannot Ignore The Public Interest When CPRL Itself Invokes Public Interest Factors To Support Its Petition.

The Board should not permit CPRL to invoke public interest arguments to support its Petition while at the same time asserting that its Petition does not require consideration of the public interest. CPRL's arguments with respect to its first question, as to why it would be

⁴ Pet. at 9 (n. 11) (urging the STB to issue the requested declaratory order even if the Petition does not present an "actual controversy" as that term is used to limit federal court jurisdiction under Article III of the Constitution).

permissible to place CP into the voting trust instead of NS, necessarily depend upon a favorable determination of the second question, as to whether it would be permissible for CP managers to move to NS during the merger approval process. That is because CPRL's supporting arguments are predicated upon the assumption that Mr. Harrison can implement his "precision railroading model" as CEO of NS during the merger review process to strengthen NS's financial condition and begin the process of developing similar corporate cultures and operational practices to facilitate the integration of rail operations if and when the STB ultimately approves the merger. Pet. at 14-15, 22-23. These CPRL arguments are themselves public interest factors.

For example, CPRL has invoked the public interest by contending that its voting trust structure would better protect the financial integrity of both CP and NS, even going so far as to assert that CPRL's control and ownership of NS would *strengthen* NS's financial integrity *regardless of the outcome of the STB's merger review*. Pet. at 14-15, 22. The latter assertion, in particular, amounts to a public interest claim that the Board should approve CPRL's voting trust proposal as a means to implement changes at NS even without a merger. Furthermore, by suggesting that the Board should not evaluate public interest considerations in this proceeding, CPRL is asking the Board to accept this public interest contention as fact and to presume that the merger review process would undermine the financial integrity of NS—which is not financially distressed and historically has been determined by the STB to be revenue adequate more consistently than any other Class I railroad—if NS were placed into trust.

CPRL also invokes the public interest through its contention that the proposed voting trust structure would enable Mr. Harrison to "begin the process of developing similar corporate cultures and operational practices during the approval process, thus reducing the risk of transitional service problems arising if the merger is approved and the two companies are

ultimately combined.” Pet. at 15. This argument, however, is solely about timing. The sooner Mr. Harrison can instill a common corporate culture and operating practice at NS, the sooner CPRL potentially could combine CP and NS smoothly after receiving STB approval. There is no reason, however, why Mr. Harrison cannot take the same amount of time to do this at NS after merger approval. While this would delay the actual integration of CP and NS operations upon STB approval longer than CPRL may desire, whether or not it is appropriate to use the voting trust structure to accelerate the merger integration process is a public interest question.

CPRL’s attempt to divorce the unlawful control factor from the public interest factor for approving voting trusts must fail because each is an integral part of the whole question. The Board cannot issue a declaratory order on the two questions posed by CPRL without considering the very factors CPRL intentionally omits from its Petition. Therefore, because CPRL has asked the Board to divorce the public interest factors from the questions presented, the Board should decline to issue a speculative and conditional declaratory order.

B. CPRL’s Petition Is Incomplete As To The Unlawful Control Factor.

Even if it were appropriate for the Board to decide CPRL’s Petition based solely upon the unlawful control factor, without regard for the public interest, the Petition also is incomplete and too abstract for that purpose. The Board’s regulations require voting trust applicants to “explain how the trust would insulate them from an unlawful control violation...” 49 C.F. R. § 1180.4(b)(4)(iv). In contrast, CPRL offers very little explanation and instead asks the Board to “assume” both “that a proposed structure for a CPRL-CP voting trust would satisfy the independence and irrevocability requirements...,” Pet. at 12, and that “the conditions for ensuring the trust will not result in a control violation [will be] met,” *id.* at 16, for purposes of this Petition. These assumptions, which fall short of fulfilling the requirement that CPRL explain how the trust would insulate it from unlawful control of both CP and NS, are designed to

achieve a favorable result by assuming away the most troubling and inconvenient elements of CPRL's proposed voting trust arrangement.

The one explanation that CPRL offers is overly formalistic and technical. Specifically, CPRL relies almost entirely upon the fact that it will possess voting control over just one carrier during the entire regulatory review process. *Id.* at 16. Although that may be factually accurate, the STB does not allow form to trump substance by restricting its inquiry to the exercise of voting control. The agency has recognized that control can be exercised in *de facto* ways short of actual voting control that requires consideration of the extent to which an individual exercises influence over a company.⁵ This is a highly fact-intensive inquiry that CPRL all but ignores.

A traditional voting trust arrangement that places the target carrier in the trust preserves the *status quo* because the target carrier's management team and operating practices, which were determined independent of the purchaser, remain constant and uninfluenced by the purchaser during the merger approval process. In contrast, under CPRL's plan to place CP in the trust, CPRL will determine the management of both CP and NS and implement changes that CPRL expressly intends will align the corporate cultures and operations of both entities prior to Board review and approval. It is unrealistic to assume that a substantial modicum of the complete control CPRL has exercised over CP prior to placing CP into trust will not extend into the trust period, especially since CPRL intends that CP's current management team "will largely remain intact" while in the trust to ensure that CP continues along its current trajectory. *Pet.* at 14; *see also, id.* at 9. Although CPRL openly acknowledges this intent, it offers no explanation as to

⁵ *Southrail Corp.—Abandonment—Between Whistler Station, AL and Waynesboro, MS*, 7 I.C.C.2d 746, 752 (1990). *See also, Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, 42 (1958) ("It is well settled that control of a company does not require a numerical majority of shares having voting rights.").

why this will not constitute *de facto* control, or how any of the unspecified compensation and communication conditions it describes, *id.* at 20-22, would mitigate such control.

By focusing solely upon the question of voting control and asking the Board to assume away the other relevant facts, CPRL is trying to dictate the outcome of the Board's decision by assuming away significant aspects of the control inquiry. This is too abstract and incomplete for the Board to issue a declaratory order. As discussed in Part III below, however, if the Board decides CPRL's Petition on the merits, it should deny the Petition based upon the limited facts presented.

C. The Incomplete And Hypothetical Nature Of CPRL's Petition Cannot Provide The Certainty That CPRL Seeks.

CPRL desires a declaratory order to quell "the specter of uncertainty" that NS has raised over CPRL's proposed voting trust structure due to the absence of precedent under the Board's post-2001 merger procedures. Pet. at 7. CPRL claims that this uncertainty "could influence [CPRL and NS stockholders'] perception of the value of going forward with a merger" and that "removing this uncertainty before the [NS annual] meeting occurs would allow a vote based on the merits of going forward, rather than one that is clouded by regulatory process questions." *Id.* at 9. But, the manner in which CPRL has framed its Petition precludes a decision that can provide the certainty CPRL desires.

As discussed in the preceding sections, CPRL asks the Board to disregard the public interest factors and to focus primarily, if not exclusively, upon CPRL's possession of voting control over just NS. But of course, because the STB would consider many more factors in an actual voting trust application, any decision on the merits of CPRL's Petition is of limited value.

To the extent the Board can and does favorably address the merits of CPRL's Petition, it can only do so with so many caveats that the decision could not possibly provide the assurances

that CPRL seeks to provide shareholders. A best case scenario for CPRL is a decision which declares that: (a) there *may* exist some *potentially permissible* scenario that avoids premature control by placing the purchaser in trust rather than the target, and (b) there *may* be some *potentially permissible* scenario for avoiding premature control when managers and directors transfer from the purchaser to the target carrier. But the Board could not declare that CPRL has presented such a scenario based upon the facts in the Petition.⁶ Indeed, as discussed in the preceding sections, and in Part III below, the Board should acknowledge, at a minimum, that the two questions presented by CPRL, when evaluated in the framework of a complete control analysis, raise considerable doubts that both could be answered in the affirmative.

III. CPRL'S PETITION CONTAINS SIGNIFICANT INDICIA OF UNLAWFUL CONTROL.

CPRL misleadingly describes its Petition as presenting “a very narrow voting trust legal question.” Pet. at 12. As discussed in Part II.B. above, this assertion is predicated upon a formalistic and technical argument that CPRL would avoid unlawful control under a literal statutory construction because CPRL would not acquire the NS voting shares until after CPRL places CP's voting shares into trust, and thus CPRL would not possess voting control over both entities simultaneously in violation of the statute. Pet. at 13-14. But “[c]ontrol can be exercised in numerous *de facto* ways short of actual percentage voting control...Control exists when an individual or affinity group has a sufficient amount of influence over a company to alter the method in which it conducts its business.”⁷ CPRL has not presented sufficient facts in its

⁶ *CSX Transp., Inc.—Pet. for Declaratory Order*, Fin. Docket No. 33388 (Sub-No. 101), slip op. at 6 (n. 10) (served Aug. 27, 2008) (“In deciding whether a declaratory order is needed to resolve uncertainty, the Board generally considers the facts *as presented in the petition.*”) (emphasis added).

⁷ *Southern Corp.—Abandonment—Between Whistler Station, AL and Waynesboro, MS*, 7 I.C.C.2d 746, 752 (1990) (underline added). See also, *Central of Georgia Ry. Co. Control*, 307

Petition for the Board to render a declaratory order on unlawful control; but if the Board nevertheless were to do so, it must deny CPRL's Petition based upon the limited facts it has presented because those facts assume both the ability and intent of CPRL to influence both CP and NS during the merger evaluation process.

Although the Petition openly acknowledges CPRL's intent to influence both CP and NS through the proposed voting trust structure, CPRL merely asks the Board to "assume" that it can overcome any concerns for purposes of its Petition. Pet. at 16. To the extent that CPRL discusses specific conditions to mitigate its influence, *id.* at 20-22, it does so without addressing the "elephant in the room," which is the fact that CPRL will exercise influence over both railroads through its stated plan to appoint the management teams of both CP and NS from current CP managers with the pre-determined objective of conforming the two companies' culture and operations, *id.* at 14-15, before the STB and the public have the opportunity to weigh-in on CPRL's overall merger proposal. This presents strong indicia that CPRL will have both the intent and ability to exercise *de facto* control over both railroads under a voting trust that places CP into the trust instead of NS and replaces NS managers with CP managers.

CPRL undeniably currently exercises complete control over CP. CPRL intends that CP's current management team, which CPRL will designate before placing CP into the voting trust, "will largely remain intact" while in the trust to ensure that CP continues along its current trajectory. Pet. at 14; *see also, id.* at 9. Once CP is placed into trust, CPRL then would acquire voting control over NS, and send CP's current CEO, Hunter Harrison, to run NS with the objective of deploying the same operating model as CP and to align the NS corporate culture and operations with those of CP. Pet. at 8-9, 14-15, and 22-23. Thus, despite the absence of voting

I.C.C. 39, 42 (1958) ("It is well settled that control of a company does not require a numerical majority of shares having voting rights.").

control over CP while it is in trust, CPRL will have plotted a course for CP, selected managers committed to following that course, and set CP on auto-pilot with the confident expectation that CP will emerge from the voting trust at the appointed place where CPRL will reassert its voting control. In the meantime, CPRL will acquire voting control over NS and replace NS managers with current CP managers who will immediately begin the process of molding NS into the image of CP. This arrangement has all the markings of CPRL's *de facto* control over CP and NS without STB approval, despite CPRL's possession of voting control over just NS.

Under the foregoing scenario, it is largely irrelevant whether CPRL will have voting control of CP during the merger approval process. CPRL plainly intends and expects CP's management to execute a plan developed under Mr. Harrison's leadership prior to placing CP into trust and departing to take control of NS. CPRL's clear intention is that both the CP and NS management teams will operate from the same playbook developed before creation of the voting trust with the common objective of meeting up at a pre-determined point on the other side of the merger approval process. CPRL's plan is based upon its current control of CP and its intention that the CPRL-appointed management team will follow the common plan after CP is placed in the voting trust.

Although it is plausible that the CP managers might chart a different course in the voting trust from CPRL's expectations, that is an unrealistic scenario. Moreover, even if the CP managers were inclined to chart a different course, the near certainty that CPRL ultimately will resume control of CP regardless of whether the STB approves the merger will provide ample incentive for CP management to maintain discipline or face the consequences at the end of the process. If the STB approves the merger, CPRL will reassert its legal control over CP. If the STB rejects the merger, CPRL is likely to revert to the *status quo* by divesting its NS stock and

reasserting its legal control over CP. The only situation in which CP management would not be subject to consequences for deviating from the CPRL's expectations would be if CPRL divested itself of the CP stock instead of the NS stock. Although possible, that outcome remains the least likely and most speculative.

CPRL cites two prior agency decisions that permitted management switches in past merger transactions from the carrier in the trust to the other carrier outside the trust as evidence that CPRL can do the same.⁸ But both of those transactions involved a typical voting trust structure that placed the target carrier in the trust, as opposed to the purchaser, whereas CPRL proposes to transfer managers from the purchaser to the target. That distinction, which enables the purchaser to control the target immediately, raises a host of troubling issues that dictate a different result. CPRL ignores those issues to the extent that they implicate public interest factors and asks the Board to assume that there are conditions sufficient to prevent unlawful control, thereby placing these questions beyond the scope of the Petition. But the CPRL's intentional disregard for public interest factors and its reliance on incomplete and speculative assumptions is precisely why the Board should not issue a declaratory order in this proceeding.⁹

The only factually similar transaction identified by CPRL is *Illinois Central Corp.—Common Control—Illinois Central R.R. Co. and The Kansas City Southern Ry. Co.*, Fin. Docket No. 32556, in which the Illinois Central ("IC") sought to acquire Kansas City Southern ("KCS"). IC sought an informal opinion from the Interstate Commerce Commission ("ICC") on the lawfulness of a voting trust that would place the IC in the trust, instead of KCS, and send several

⁸ Pet. at 17, 22 (citing *Santa Fe Southern Pac. Corp.—Control—Southern Pac. Transp. Co.*, Fin. Docket No. 30400, 1983 ICC Lexis 70 (Dec. 22, 1983), and *Canadian Nat'l Ry. Co.—Control—Illinois Central Corp.*, Fin. Docket No 33556, Decision No. 6 at 5 (Aug. 14, 1998)).

⁹ Cf., *CSX Transp., Inc.—Pet. for Declaratory Order*, Fin. Docket No. 33388 (Sub-No. 101), slip op. at 6 (n. 10) (served Aug. 27, 2008) (declining to issue declaratory order based upon limited facts and speculative statements).

officers and directors from IC to KCS. In response to opposition filings by various labor and shipper interests over this unorthodox voting trust structure, the ICC requested public comments. *Id.* (decision served Oct. 21, 1994). The opposition filings, along with the ICC's decision soliciting public comment, identified several troubling issues with a voting trust arrangement that placed the purchaser in the trust and shifted management from the purchaser to the target carrier. *Id.*, slip op. at 3-4. No further proceedings followed, however, because IC and KCS subsequently abandoned their proposed merger. Those very same concerns apply with equal force to CPRL's proposed voting trust structure. Thus, it would be inappropriate for the Board to address CPRL's Petition without regard for the same factors that the ICC deemed relevant to determination of the IC/KCS request for advisory opinion.

CPRL's suggestion that unspecified compensation and communications conditions will mitigate any concerns over CP managers taking control of NS do not convincingly explain how those conditions will do so. CPRL offers few specifics, except to point out that such conditions have been employed in other voting trusts and therefore should be acceptable for CPRL's proposed trust. But again, CPRL ignores the fact that those prior trusts were traditional trusts that placed the target carrier into trust rather than the purchaser, thus preserving the independent management of the target, whereas the primary intent of CPRL's proposal is to influence the management of both companies. CPRL remains oblivious to the significance of that distinction.

The Board should resist CPRL's invitation to "assume" that unspecified conditions will protect against a control violation. Pet. at 16. If the Board were to accept CPRL's invitation, this proceeding would be reduced to a determination that, so long as CPRL does not possess voting control over CP while CP is in trust, there will be no unlawful control based upon the assumption that CPRL will accept various vague and general conditions that would address all of

the foregoing concerns through unspecified means. This assumes the existence of workable and effective conditions, which is a question that CPRL's Petition avoids. Instead, CPRL makes general references to communication and compensation conditions imposed upon other voting trust arrangements involving different facts, but deferring for this Petition any discussion as to how such conditions would alleviate, if not eliminate, the troubling indicia of control when the purchaser places itself in trust and sends its management to run the target carrier. Pet. at 20-22. CPRL's Petition is disingenuous because the acknowledged intent of the proposed voting trust structure is to facilitate the establishment of a common culture and operations between CP and NS, which is an objective that inherently assumes influence over both entities.

CPRL also suggests that the Board need not be concerned about its proposed voting trust because the end-to-end nature of a CP-NS combination reduces competitive concerns. Pet. at 18, 21-22. But whether end-to-end mergers reduce competition is a proper subject for the merger proceeding, not the voting trust determination.

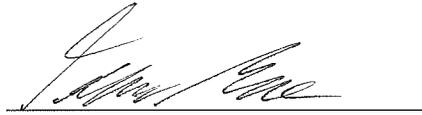
Finally, CPRL's voting trust structure assumes the outcome of the merger application before the public, and ultimately the STB, have had their say. The Joint Shipper Associations are quite interested in the potential implications of CPRL's planned transformation of NS operations, including impacts on service, safety, investment, rates, and other factors. If CPRL presents a merger application for approval of a CP-NS transaction, the Joint Shipper Associations plan to participate in the proceeding to understand the implications of CPRL control and voice their views. CPRL's voting trust arrangement would deprive them of that opportunity, however, because CPRL's control of NS during the merger approval process would present them and the Board with a *fait accompli* regardless of the Board's ultimate decision. If

the Board rejects the merger application, there will be no realistic opportunity for NS to return to the antecedent *status quo*.

IV. CONCLUSION

For the foregoing reasons, the Joint Shipper Associations urge the STB to decline CPRL's request for a declaratory based upon the numerous incomplete facts and hypothetical assumptions surrounding the two abstract questions posed in the Petition. If the Board nevertheless opts to address the merits, it should decide both questions negatively based upon the limited facts CPRL presents and the strong indicia of control that is inherent in a voting trust structure that places the purchaser in trust and transfers management from the purchaser to the target carrier.

Respectfully submitted.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Comments of the Joint Shipper Associations" has been served this 8th day of April 2016, via first class mail upon the following:

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